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No. 08-1082

IN THE
Supreme Court of the United States

CITY OF MAYWOOD, BRUCE LEFLAR, ANGEL VILLEGAS, SEAN RICHARDSON, JERRY SALGADO, ROBERT LEACH AND DARIN MOELLER,

Petitioners,

v.

JOSEPH DENSMORE, JR.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Under the First Amendment analysis in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), should a district court decide material disputes over the scope and content of a public employee's job duties as a matter of law on summary judgment?

2. Did the court of appeals correctly conclude that there were genuine issues of material fact regarding the scope and content of Joseph Densmore's job duties?

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INTRODUCTION

In *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), this Court held that speech made by public employees "pursuant to their official duties," rather than as citizens, does not receive First Amendment protection. The Court made clear that the inquiry into the scope of an employee's job duties is a "practical one" that requires looking at "the duties an employee actually is expected to perform." *Id.* at 424. In this case, the court of appeals found that there were disputed issues of material fact about the scope and content of Respondent Joseph Densmore's job duties that precluded summary judgment. Pet. App. A-4. Petitioners seek review of this fact-bound determination, claiming a circuit split over whether the scope of a public employee's job duties is a question of law or a question of fact. But although some of the cases cited by Petitioners hold that the ultimate question of whether an employee was speaking as an employee or citizen is a question of law, none of them resolve underlying disputes about the employee's actual job duties at summary judgment. Here, where there were underlying disputes over what duties the public employee was expected to perform, the court below correctly held that there were disputed issues of material fact and, accordingly, correctly denied summary judgment.

STATEMENT OF THE CASE

On April 1, 2004, Joseph Densmore began working for the City of Maywood as a probationary police officer trainee. Pet. App. B-3. Six weeks later, on May 13, Densmore saw Michael Singleton, his field training officer, beat up a handcuffed prisoner, Jose Bernal, in the sally port area of the police station, an area visible to the public. Singleton strangled and beat Bernal, leaving him unconscious. Densmore radioed the Fire Paramedics and

Sergeant Sean Richardson and followed the ambulance carrying Bernal to the hospital. *Id.* at B-4-B-5.

On the way back to the police station from the hospital, Singleton told Densmore that they were going to have to write a report justifying Singleton's use of force. Singleton attempted to persuade Densmore to falsify the report and claim that Bernal had committed a felony assault likely to result in great bodily injury in violation of § 245 of the California Penal Code by head-butting, kicking, and attempting to bite Singleton. Densmore refused to follow his field training officer's instructions. Singleton eventually gave up coaching Densmore and rewrote the report using Densmore's password. *Id.* at B-5.

Although Densmore knew that there was an unofficial code of silence within the Maywood Police Department, under which officers were expected to cover up for each other, *see* Appellant's Excerpts of Record in the Ninth Circuit (Ct. App. ER) at 245, and although the field training program policy prohibited him from communicating outside his chain of command, *id.* at 280, the next day, while off duty, Densmore e-mailed Sergeant Robert Leach about Singleton's misconduct. *Id.* at 136, 311. Six days later, he met with Chief of Police Bruce Leflar and Captain Darin Moeller to talk about the incident. Pet. App. B-7.

Starting the day after he sent his e-mail to Leach, police officers began treating Densmore differently. A supervisory officer who had previously been friendly became confrontational, chastised Densmore in front of civilian witnesses, and falsely accused him of failing to follow orders and correct procedures. Ct. App. ER 232-34.

Another officer said to him: "I smell cheese, there must be a rat." Sergeant Leach stated, "We should have left him in Orange County." *Id.* at 245. On May 19, Densmore was assigned to work with Officer Angel Villegas, who proceeded to exaggerate or fabricate eighteen instances of Densmore allegedly performing his duties in an unsafe manner. *Id.* at 235. Less than a month later, Densmore was fired.

Densmore brought this action against the City of Maywood and several police officer employees for retaliating against him for exercising his First Amendment rights. The district court granted summary judgment for the defendants. Quoting *Garcetti v. Ceballos*, 547 U.S. at 421, the court explained that "'when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes.'" Pet. App. B-12. However, although Densmore had presented evidence that reporting his supervisor's misconduct was not within the scope of the job duties he was actually expected to perform, the district court nonetheless concluded as a matter of law that he was acting within the scope of those duties.

The court of appeals reversed in a short unpublished decision. The court recognized that in determining whether a public employee is acting as a citizen or as an employee pursuant to his job duties, "formal job descriptions [are] not determinative, but that the scope of an employee's professional duties must be considered as a 'practical' matter," Pet. App. A-2-A-3 (quoting *Garcetti*, 541 U.S. at 424-25), and it explained that "'the determination whether the speech in question was spoken as a public employee or a private citizen presents a mixed

question of fact and law." *Id.* at A-4 (quoting *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008)). Noting that Densmore had presented evidence of a code of silence in the department to show "that in reality he was *not* expected to report his fellow officers, but to cover up their misdeeds," *id.* at A-3 (emphasis in original), the court determined that, here, there were "genuine disputes of material fact regarding the scope and content of [Densmore's] job responsibilities" that precluded summary judgment. *Id.* at A-4 (citation ommitted) (alteration in original).

REASONS FOR DENYING THE WRIT

I. There is No Meaningful Circuit Split Here.

Petitioners' primary argument for review is that there is a circuit split over whether the scope of a public employee's job duties is a question of law. Pet. 28. But although some courts describe the *ultimate question* of whether a public employee is speaking as a citizen or as an employee pursuant to his job duties as a "matter of law" and others describe it as a "mixed question of law and fact," none of the cases cited by Petitioner holds that where there is a subsidiary dispute over the scope and content of an employee's actual job duties—such as found by the court of appeals in this case—that dispute should be resolved by the court.

For example, Petitioners contend that the decision below is in conflict with the Fifth Circuit, relying on *Charles v. Grief*, 522 F.3d 508 (5th Cir. 2008). In *Charles*, however, the court stated that the *ultimate question* of whether "speech is entitled to protection" is a matter of law. *Id.* at 513 n.17. The court did not mention any

material dispute over the scope of Charles's job duties—it found that Charles was not speaking as an employee under any "conceivable job duties" he might have, *id.* at 514—and it did not opine about whether it would have resolved the dispute at summary judgment if such a dispute had existed. Tellingly, when the Fifth Circuit found the plaintiff's official job duties unclear in a post-*Charles* case, *Williams v. Riley*, 275 Fed. Appx. 385 (5th Cir. 2008), the court denied summary judgment.

Similarly, although the court in the Tenth Circuit case relied on by Petitioners, *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192 (10th Cir. 2007), stated that the question of whether the employee is speaking pursuant to his official duties was a question for the court, it did not indicate that there were material disputed questions over the scope of those job duties. In fact, the court noted that it was "viewing the evidence in the light most favorable to the plaintiffs," *id.* at 1204, indicating that it recognized that there can be disputed factual issues in determining whether an employee is speaking pursuant to job duties. Finally, in the other case on which petitioners rely to demonstrate a split, *Wilburn v. Robinson*, 480 F.3d 1140, 1150 (D.C. Cir. 2007), the D.C. Circuit did not need to resolve disputes over the scope of the employee's job duties because it determined that the speech fell within the employee's job responsibilities *as they were described by her.*

In short, Petitioners have not demonstrated that the courts that describe the ultimate question as being a "matter of law" would resolve cases at summary judgement where, as here, there are underlying disputes about what duties an employee actually is expected to

perform. And the Ninth Circuit agrees that, once the factual disputes about the scope and content of the employee's job duties are resolved, the "'ultimate constitutional significance of the facts as found' is a question of law." *Eng v. Cooley*, 552 F.3d 1062, 1071 (9th Cir. 2009) (quoting *Posey*, 546 F.3d at 1129). Indeed, when there are no material disputed issues about the scope of the employee's job duties, courts in the Ninth Circuit decide the ultimate issue of whether the speech was spoken as a citizen or as an employee pursuant to job duties as a matter of law. *See White v. Nevada*, 312 Fed. Appx. 896, 897 (9th Cir. 2009) (stating, in affirming summary judgment, that the plaintiffs' speech was "made pursuant to their official duties rather than their rights as private citizens"); *Brown v. Hawaii*, 2009 WL 330209, at *10 (D. Haw. Feb. 10, 2009) (concluding, on motion to dismiss, that certain statements were made pursuant to job duties). The Third Circuit, which the petition places on the Ninth Circuit's side of the purported split, does the same. *See Gorum v. Sessons*, 561 F.3d 179, 186 (3rd Cir. 2009) (stating, in affirming summary judgment, that plaintiff's actions "came within the scope of his official duties"). There is no meaningful conflict here.

II. The Court of Appeals Correctly Concluded That There Are Genuine Issues of Material Fact that Preclude Summary Judgment

1. In their first question presented, Petitioners ask this Court to grant review to determine as a matter of law whether Densmore spoke pursuant to his job duties. Pet. i. Notably, the text of the Petition offers no argument for why this case-specific question is worthy of this Court's review. *See* S. Ct. R. 10.

In any event, deciding as a matter of law that Densmore was speaking as an employee would be inconsistent with *Garcetti*'s explanation that the proper inquiry is "a practical one." *Garcetti*, 547 U.S. at 424. Petitioners' argument relies heavily on a general statement in the police department's policy manual that officers are supposed to respond to violations of law that come to their attention. *See* Pet. i, 35. But Densmore presented evidence that, despite that statement, he was not actually expected to report misconduct by fellow officers. Granting summary judgment to defendants based on the policy manual, when Densmore presented conflicting evidence about his actual job duties and demonstrated that, in reality, his supervisors' expectations diverged sharply from that policy statement, would conflict with this Court's recognition in *Garcetti* that the proper inquiry must focus on "the duties an employee is actually expected to perform," not his "[f]ormal job description." 547 U.S. at 424-25. As *Garcetti* explained, "the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties." *Id.* at 425.[1]

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[1]Petitioners also claim that "California law" requires police officers to report crimes. Pet. i. Although Petitioners cite no California statutes or caselaw, they are presumably referring to *Titus v. Civil Service Comm'n*, 130 Cal. App. 3d 357 (1982), *Christal v. Police Comm'n*, 33 Cal. App. 2d 564 (1939), and *Alhambra Police Officers Ass'n v. City of Alhambra Police Dep't*, 113 Cal. App. 4th 1413 (2003), which were cited in the district court's opinion. Pet. App. B-16. Those cases, however, discuss a

(continued...)

Garcetti also shows that the other factors relied on by Petitioners to support their claim that Densmore was acting within his job duties are not dispositive. Petitioners note that Densmore observed Singleton's misconduct while on the job, reported it to people in the department, and never communicated it to the public. Pet. 35. However, Densmore was a trainee with no responsibility to investigate other officers, he reported on his own time, and he reported outside his chain of command. Moreover, *Garcetti* specifically stated that the First Amendment may protect "expressions made at work" and "expressions related to [a public employee's] job." *Garcetti*, 547 U.S. at 420-21. Given the genuine disputed issues over the scope and content of Densmore's job duties, the court of appeals was correct to remand the case for further proceedings to determine whether the First Amendment protected Densmore's speech here.

2. Petitioners nonetheless contend that summary judgment should have been granted in their favor, asserting that the scope of an employee's job duties should be decided by the court as a matter of law. But questions about what duties a public employee is expected to perform, when in genuine dispute, involve precisely the "application of those ordinary principles of logic and common experience which are ordinarily entrusted to the

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[1](...continued)
police officer's duty to cooperate with ongoing criminal investigations, not a duty to report misconduct by a supervising officer. *See Titus*, 130 Cal. App. 3d at 365; *Christal*, 33 Cal. App. 2d at 567; *Alhambra Police Officers Ass'n*, 113 Cal. App. 4th at 1423.

finder of fact." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 n.17 (1984).

Petitioners analogize the determination of whether an employee has acted pursuant to his job duties to the voluntariness of confessions, citing *Miller v. Fenton*, 474 U.S. 104, 115 (1985). In *Miller*, this Court held that the "ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution," was a legal question that required an independent federal determination. *Id.* at 112. The Court recognized, however, that "subsidiary factual questions," were entitled to a presumption of correctness given to findings of fact. *Id.* Similarly, here, the disputed subsidiary factual questions about the scope and content of an employee's actual job duties are not legal questions that can be resolved at summary judgment.[2]

Indeed, at the very end of the Petition, even Petitioners appear to recognize that the trier of fact can play a role when an employee's job duties are in dispute, admitting that "[i]t may be true that in assessing a plaintiff's job duties in a given case, a court may need to seek a jury's factual determination of *some* foundational facts." Pet. 37 (emphasis in original). Petitioners' unwillingness to

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[2]Petitioners also invoke *Miller v. Fenton* for the proposition that sometimes "one judicial actor is better positioned than another to decide the issue in question." Pet. 34 (quoting *Miller*, 474 U.S. at 114). Petitioners, however, offer no reason why courts are "better positioned" than juries to resolve underlying questions about what is expected of an employee.

recognize the facts at issue in this case as the type of facts that are appropriately decided by a trier of fact stems from their characterization of those facts as "the plaintiff's subjective opinions about the scope of [his] job duties." *Id.* But Densmore's evidence was not about his "belief," "subjective understandings," or "personal opinions about the scope of [his] job duties." *Id.* at 36. The evidence included not only his own testimony about what he was told by his supervisor about his job duties, *e.g.*, Ct. App. ER at 247, but a declaration from a private investigator who had "conduct[ed] numerous background investigations and . . . a substantial number of internal investigations" for the department, including the internal investigation into the Singleton matter, discussing the code of silence in the department, *id.* at 309, and a declaration from a police practices expert who found it "apparent . . . that the defacto policies of the Department informed officers that it was unacceptable to report a fellow officer for misconduct." *Id.* at 358. In short, evidence from Densmore, from an independent investigator, and from a police practices expert all helped create a genuine dispute of material fact over the scope and content of Densmore's job duties. And given these genuine issues of material fact, the court of appeals was correct to deny summary judgment. *See, e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("[S]ummary judgment will not lie if the dispute about a material fact is 'genuine[.]'").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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